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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The Honorable William E. Kennard
Chairman
Federal Communications Commission
1919 M Street N.W. -- Room 814
Washington, D.C. 20554

Re: Reciprocal Compensation for ISP Traffic, CC Docket 96-98

Dear Commissioner Kennard:

The Commission has announced that it intends to adopt an order regarding the obligation of incumbent local exchange carriers ("ILECs") to pay reciprocal compensation to competitive local exchange carriers ("CLECs") that deliver traffic to Internet Service Providers ("ISPs"). The Information Technology Association of America ("ITAA"), which is the leading trade association for ISPs and other providers of information services, urges the Commission to avoid taking any action that could undermine the current, pro-competitive regulatory regime applicable to the information services market.

ITAA understands that the Commission is seeking to achieve three goals. First, to assert Federal jurisdiction over most dial-up traffic between ISPs and their subscribers. Second, to preserve existing reciprocal compensation agreements, which treat ISP traffic as local. And, finally, to preserve the current regulatory regime under which ISPs are permitted to purchase local telecommunications services out of State tariffs. The Association further understands that, in order to achieve these goals, the Commission is considering finding that a significant portion of ISP-bound dial-up traffic is interstate. The Commission would then hold that it has authority to adopt a regulatory regime to govern this traffic, but would nonetheless "grandfather" existing reciprocal compensation agreements that treat ISP traffic as local. At the same time, the Commission would acknowledge that the States have jurisdiction over dial-up services used in connection with "intrastate Internet traffic."

ITAA urges the Commission not to adopt this approach. The approach under consideration ignores the way in which traffic is carried over the Internet, and inadvertently

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could undermine existing Commission policies that are of critical importance to the information services industry.

The approach under consideration is based on the assumption that – as in the voice environment – a particular Internet "call" can be classified as interstate or intrastate. This is not correct. In a traditional voice call, the subscriber and the LEC know the precise points of origination and termination. In contrast, neither the subscriber, nor the ISP, nor the LEC knows the geographic location of the server at which a given call to the Internet terminates. Indeed, many on-line sessions involve subscriber interaction with multiple servers, some of which are interstate and some of which are intrastate. In some cases, such as sending a "broadcast" email, the subscriber may interact with both interstate and intrastate servers simultaneously. Consequently it simply is not possible to classify a given dial-up call to the Internet (or even a portion of all dial-up calls to the Internet) as interstate or intrastate.[1]

Given the infeasibility of determining the jurisdictional nature of dial-up calls to the Internet, if the Commission adopts the approach under consideration, virtually all dial-up ISP traffic is likely to be treated as jurisdictionally interstate. Should this occur, it would be difficult for the Commission to find a legally sustainable basis on which to uphold existing reciprocal compensation agreements, which treat this traffic as local. The Commission also would be hard-pressed to justify its decision to allow ISPs to use State-tariffed local business lines to receive these dial-up calls. There is no sound basis for putting these important policies at risk.

ITAA believes that there is only one legal theory that can achieve all three of the Commission's goals, while surviving judicial review. That theory is the one the Commission adopted – and the Eighth Circuit upheld – in the *Access Charges Appeal.*

In that case, several ILECs challenged the Commission's decision to allow ISPs to continue to purchase State-tariffed local business line service. The ILECs asserted that ISP traffic was interstate and, therefore, that the Commission could not allow the cost of this traffic to be recovered out of State tariffs. In its brief, the Commission forcefully countered this argument. The agency argued that traffic between a customer and the customer's ISP is jurisdictionally mixed, and cannot be separated into interstate and intrastate components. FCC Brief at 79. As a result, the Commission stated that it could have asserted exclusive Federal authority over local telecommunications services used to transport information between

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[1] Indeed, in many cases, the LECs cannot determine whether dial-up traffic is destined for the Internet, a non-Internet based information service, or a corporate private line network. As a result, any regime that seeks to treat dial-up traffic to the Internet differently from other physically local traffic destined for a private line network would be difficult – if not impossible – to administer. Distinguishing between traffic destined for ISPs and traffic destined for other business users also would constitute unlawful discrimination, in violation of Section 202 of the Communications Act.

subscribers and their customers. *Id.* at 80. Notwithstanding this authority, the Commission continued, it chose to require that ILECs recover the cost of dial-up traffic between ISPs and their subscribers through a combination of State business tariffs and Federal end-users charges (such as the Subscriber Line Charge ("SLC")). The Commission also noted that it had initiated a separate proceeding, which is considering new regulatory approaches, potentially including establishment of a Federal regulatory regime. *Id.* at 70-72.

The Eighth Circuit upheld the Commission's approach. The court observed that:

> As the FCC argues, the services provided by ISPs may involve both an intrastate and an interstate component and it may be impractical if not impossible to separate the two elements. *See California v. FCC*, 905 F.2d 1217, 1244 (9th Cir. 1990). Consequently, the FCC has determined that the [local telecommunications] facilities used by ISPs are "jurisdictionally mixed," carrying both interstate and intrastate traffic. FCC Brief at 79. Because the FCC cannot reliably separate the two components involved in completing a particular call, or even determine what percentage of overall ISP traffic is interstate or intrastate, *see id.*, . . . the Commission has appropriately exercised its *discretion* to require an ISP to pay intrastate charges for its line and to pay the SLC . . . .[2]

By applying the jurisdictionally mixed approach in the present matter, the Commission can achieve all three of its goals. Under this approach, the Commission would find that, because dial-up traffic between an ISP and its subscribers is jurisdictionally mixed and inseverible, it could assert Federal jurisdiction over *all* dial-up ISP traffic. At the same time, however, the Commission could defer to the States – thereby allowing them to continue to apply the full range of State regulation, including regulation requiring the payment of reciprocal compensation, to dial-up ISP traffic. Consistent with the Eighth Circuit's decision in the *Access Charges Appeal*, the Commission also could continue to allow ISPs to purchase State-tariffed business lines. Finally, the Commission could initiate a new inquiry to consider whether to replace the established State-managed regime with a comprehensive Federal approach.[3]

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[2] *Southwestern Bell Tel. Company v. FCC*, No. 97-2618, at 41 (8th Cir. Aug. 19, 1998) (emphasis added).

[3] We recommend the following language:

> As we found in our recent *DSL Order*, traffic between an ISP and its subscribers is jurisdictionally mixed. Because it is not possible to determine whether this traffic terminates at a server within the same State as the subscriber, or in a different State from the subscriber, there is no feasible means to separate dial-up calls to an ISP into interstate and intrastate categories and to apply different

This approach is consistent with the actions that the Commission took last week in the *DSL Order*. In that Order, the Commission found that DSL traffic is a mixed-use special access service. The Commission therefore applied its established rule that these facilities are subject to Federal regulation in any case in which an estimated ten percent of the traffic carried is jurisdictionally interstate. Like DSL traffic, dial-up ISP traffic is jurisdictionally mixed. However, the Commission has never adopted a comparable "ten percent rule" for dial-up traffic. As a result, the Commission is free to determine, as a matter of policy, the most appropriate division of Federal and State authority over this traffic.

Federal and State regulations. Consequently, as the Eighth Circuit recognized, we have significant "discretion" to adopt the appropriate regulatory regime. Consistent with existing precedent, we could assert exclusive Federal jurisdiction over this traffic. We choose not to do so at the present time. Instead, we shall continue to subject this traffic to a mix of Federal and State regulation. Under this approach, we shall continue to allow the States to regulate ISP-bound traffic – like all dial-up traffic destined for local business customers – as local traffic. Thus, in any Section 252 arbitration, the States must require ILECs to apply the same reciprocal compensation arrangements to ISP traffic that it applies to other end-user traffic. The States also must allow ISPs to purchase service out of State tariffs generally available to business customers. Allowing the States to exercise a significant degree of regulatory authority over ISP-bound dial-up traffic is consistent with the approach that we have used for other jurisdictionally mixed local services, such as Centrex and vertical services. *See Illinois Bell,* 883 F.2d 104, 114 (D.C. Cir 1989) (The fact that costs are assigned to the intrastate jurisdiction does "not negate the mixed interstate-intrastate character of services like Centrex."); *Filing and Review of Open Network Architecture Plans,* Phase I, 4 FCC Rcd 1, 144 & n.156 (1988) (The Commission "could require dual federal/state tariffing or possibly even exclusive federal tariffing . . . for [vertical] service . . . [but] we see no need to require separate federally tariffed charges for such service."). At the same time, we will initiate a new proceeding to determine whether to develop a Federal regulatory regime applicable to this traffic.

We recognize that we are submitting our views after the process is far advanced. However, we believe that the Commission must take great care to avoid any decision that could inadvertently undermine the pro-competitive policies that have allowed the Internet to flourish. Please do not hesitate to contact me if you would like to discuss this matter in greater detail.

Sincerely,

Jonathan Jacob Nadler

Counsel for the
Information Technology Association
of America

cc: Hon. Susan Ness
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